Office Supreme Court, U.S.
FILED
JUL 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-125

In the Supreme Court of the United States

October Term, 1981

ASHTABULA COUNTY SAVINGS AND LOAN COMPANY,
Petitioner,

vs.

JUDY V. DAVIS, Individually and As Administratrix of the Estate of DANNY I. DAVIS, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio

JOHN A. HALLBAUER
Counsel of Record
PARKS, EISELE, BATES & WILSMAN
1100 The Illuminating Building
Cleveland, Ohio 44113
(216) 241-2840
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Whether a state court's imposition of additional disclosure requirements and assessment of liabilities upon a financial institution for the use of a separate, non-contractual Federal Reserve Board form in order to comply with the Federal Truth in Lending Act and Federal Reserve Regulation Z is precluded by the supremacy clause of the United States Constitution and the Federal Truth in Lending Act.

2. Whether a state court's retroactive formulation of disclosure requirements and modification of the contractual relationship between a debtor and a creditor predicated upon the language of the Truth in Lending Act and a Federal Regulation Z form is precluded by the Truth in Lending Act and by the due process requirement of the Fourteenth Amendment to the United States Constitution.

PARTIES INVOLVED

The caption to this petition for writ of certiorari contains the names of all the parties involved in this proceeding. However, subsequent to the occurrence of all operative facts, and after the institution of legal proceedings, petitioner Ashtabula County Savings and Loan Company merged into Cardinal Federal Savings & Loan Association of Cleveland, Ohio. Cardinal Federal by operation of law thereby succeeded to all rights and liabilities of Ashtabula County Savings and Loan Company. For consistency with the names of the parties used by the Ohio state courts, petitioner's former name has been used in the caption and throughout this petition.

Although other persons were once parties to this litigation, they are not involved in this petition. All issues between petitioner and respondent were separately tried and appealed through the Ohio courts.

TABLE OF CONTENTS

Questions Presented I

Parties Involved II

Opinions Below 1

Jurisdiction 2

Constitutional, Statutory, and Regulatory Provisions Involved 2

Statement of the Case 6

Reasons for Granting the Writ 13

I. Introduction 13

II. Both the Federal Truth in Lending Act and the Supremacy Clause of the United States Constitution preclude the imposition upon a creditor of disclosure duties and liabilities exceeding those in the Act for the use of a non-contractual Truth in Lending disclosure form 15

III. The Ohio Supreme Court's retroactive creation of disclosure requirements and modification of contract rights between a debtor and a creditor predicated upon the language of the Federal Regulation Z form is also both violative of petitioner's due process rights and contrary to the decisions of other courts 20

Conclusion 23

Appendix:

Opinion of the Supreme Court of Ohio (May 6, 1981) A1

Orders of the Supreme Court of Ohio (April 22, 1981) A17

Opinion of the Court of Appeals of Ashtabula County, Ohio (February 19, 1980) A19
Judgment Entry of the Court of Appeals of Ashtabula County, Ohio (February 20, 1980) A26
Judgment/Opinion of the Court of Common Pleas of Ashtabula County, Ohio (January 10, 1979) A28
Judgment Entry of the Court of Common Pleas of Ashtabula County, Ohio (March 12, 1979) A36
Judgment Entry of the Court of Common Pleas of Ashtabula County, Ohio (March 12, 1979) A37
Notice to Customers Required by Federal Law - Federal Reserve Regulation Z (Davis Ex. 2) A38
Federal Reserve Board Model Form A39

TABLE OF AUTHORITIES

Cases

Anderson Bros. Ford v. Valencia, ... U.S. ..... (1981), 49 U.S.L.W. 4635 (June 9, 1981) 16
Bass v. Home Federal S. & L. Assn., 266 Ark. 770, 587 S.W.2d 48 (Ark. App. 1979) 23
Burgess v. Carlottesville, S. & L. Assn., 349 F. Supp. 133 (W.D. Va., 1972), *remanded* 477 F.2d 40 (4th Cir., 1973) 22
Crosby v. Mellon Bank, N.A., 407 F. Supp. 233 (W.D. Pa., 1976) 16
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) 16, 19
In re Estate of Johnson, 195 Neb. 131, 236 N.W.2d 838 (1975) 23
Lagrone v. Johnson, 534 F.2d 1360 (9th Cir., 1976) 17

Lambert v. California, 355 U.S. 225 (1957) 22
Mourning v. Family Publications Service, 411 U.S. 356 (1973) 16
Peer v. First Federal S. & L. Assn., 273 Md. 610, 331 A.2d 299 (1975) 22, 23
Shelley v. Kraemer, 334 U.S. 1 (1948) 22
Snow v. Merchants National Bank of New Bedford, 309 Mass. 354, 35 N.E.2d 213 (1941) 19
Umbaugh Pole Building Co. v. Scott, 58 Ohio St. 2d 282, 390 N.E.2d 320 (1979) 19

Constitutional Provisions, Statutes and Regulations

Federal Reserve Board Regulation Z, §226.2(cc), 12 C.F.R. §226.2(cc) 4, 8, 17
Federal Reserve Board Regulation Z, §226.4(a), 12 C.F.R. §226.4(a) 4, 17
Federal Reserve Board Regulation Z, §226.6 17
Federal Reserve Board Regulation Z, §226.8(a), 12 C.F.R. §226.8(a) 5, 8, 16, 17, 18
Ohio Rev. Code §3905.21 9
Ohio Rev. Code §3915.05 9
Truth in Lending Act §102, 15 U.S.C. §1601 ..... 2, 13, 16
Truth in Lending Act §103(h), 15 U.S.C. §1602(h) 13
Truth in Lending Act §104, 15 U.S.C. §1603 13
Truth in Lending Act §106(b), 15 U.S.C. §1605(b) 17
Truth in Lending Act §111, 15 U.S.C. §1610 ..... 3, 18
Truth in Lending Act §112, 15 U.S.C. §1611 ..... 13, 14
Truth in Lending Act §121(a), 15 U.S.C. §1631(a) 3, 18
Truth in Lending Act §122(b), 15 U.S.C. §1632(b) 15
Truth in Lending Act §130, 15 U.S.C. §1640 ..... 3, 13, 14, 18
U.S. Const., Amend. XIV, §1 ..... 2, 21
U.S. Const., Art. VI (clause 2) 2, 19

Other

CCH Consumer Credit Guide ¶3855, Federal Reserve Regulation Z Model Form 7

Federal Reserve Board pamphlet, *What You Ought to Know About Federal Reserve Regulation Z*, 1969 7

No.

In the Supreme Court of the United States

October Term, 1981

ASHTABULA COUNTY SAVINGS AND LOAN COMPANY,
Petitioner,

vs.

JUDY V. DAVIS, Individually and As Administratrix of the Estate of DANNY I. DAVIS, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Ohio

Petitioner, Ashtabula County Savings and Loan Company, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in this proceeding on April 22, 1981.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is officially reported at 66 Ohio St. 2d 74 (1981) as "Stone vs. Davis" (App. at A1-A16). The opinion of the Ashtabula County, Ohio, Court of Appeals (App. at A19-A25) and the judgment-opinion of the Ashtabula County, Ohio, Court of Common Pleas (App. at A28-A35) are not reported.

JURISDICTION

The judgment of the Ohio Supreme Court is dated, and was announced and entered, on April 22, 1981. This petition for writ of certiorari is filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Article VI (clause 2):

> This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Constitution, Amendment XIV, §1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Truth in Lending Act[1] §102, 15 U.S.C. §1601:

> . . . The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.

---

1. All quotations of, and references to, the Federal Truth in Lending Act contained herein are to the provisions of that act in effect in October, 1972, when the federal disclosure notice involved in this action was given.

Truth in Lending Act §111, 15 U.S.C. §1610;

(a) This title does not annul, alter, or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this title or regulations thereunder, and then only to the extent of the inconsistency.

(b) This title does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this title extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply.

* * * * *

(d) Except as specified in sections 125 and 130, this title and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

Truth in Lending Act §121(a), 15 U.S.C. §1631(a):

(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulation of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this chapter.

Truth in Lending Act §130, 15 U.S.C. §1640(a):

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer

credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

* * * * *

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

Federal Reserve Board Regulation Z, §226.2(cc), 12 C.F.R. §226.2(cc):

A transaction shall be considered consummated at the time a contractual relationship is created between a creditor and a customer irrespective of the time of performance of either party.

Federal Reserve Board Regulation Z, §226.4(a), 12 C.F.R. §226.4(a):

(a) *General Rule.* Except as otherwise provided in this section, the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges . . . including any of the following types of charges:

* * * * *

(5) Charges or premiums for credit life, accident, health, or loss of income insurance, written in connection with any credit transaction unless

(i) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and

(ii) any customer desiring such insurance coverage gives specific dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance.

Federal Reserve Board Regulation Z, §226.8(a), 12 C.F.R. §226.8(a):

(a) *General Rule.* Any creditor when extending credit other than open end credit shall, in accordance with §226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as provided in paragraphs (g) and (h) of this section, such disclosures shall be made before the transaction is consummated. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. All of the disclosures shall be made together on either

(1) The note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or

(2) One side of a separate statement which identifies the transaction.

STATEMENT OF THE CASE

This action originated in June, 1977, in the Ashtabula County, Ohio, Court of Common Pleas with the filing of a mortgage foreclosure complaint by George L. and Clara S. Stone, who held a second mortgage in the amount of about $19,000 on a farm owned by respondent Judy V. Davis. Petitioner herein, Ashtabula County Savings and Loan Company ("Ashtabula S & L"), was also named a defendant since it held the first mortgage on the property. Ashtabula S & L then filed a cross-complaint against Judy V. Davis on the promissory note and the mortgage which she and her then deceased husband, Danny I. Davis, had given to Ashtabula S & L in return for the loan which enabled them to buy the farm. Mrs. Davis then intervened in the action in her additional capacity as administratrix of her husband's estate, and in both capacities filed a counterclaim to the cross-complaint of Ashtabula S & L. All issues between Ashtabula S & L and Mrs. Davis were separately tried and determined by the Ohio Court of Common Pleas and by the Ohio appellate courts.

Although the pleading filed by respondent Judy V. Davis against petitioner contained three counts, the only essential allegations were that Mr. Davis had died in an accident on July 18, 1975 (he was about twenty-three years of age at that time), that he had signed a form on October 27, 1972, a copy of which was attached as the sole exhibit to the pleading, and that Ashtabula S & L's $60,000 note and mortgage should be cancelled because no insurance had paid the note upon Mr. Davis' death. That form, which is reproduced in the appendix hereto (A38), was entitled "Notice to Customers Required by Federal Law - Federal Reserve Regulation Z". This form, designed by the Federal Reserve Board to accomplish the limited purposes

of the Federal Truth in Lending Act and Regulation Z and used by petitioner only for that purpose, is the sole basis for the holdings of the Ohio courts that petitioner Ashtabula S & L is liable to respondent Davis for the full unpaid balance of the note secured by the mortgage.[2]

To put this case into proper perspective, the facts as they were developed at the trial which occurred in October, 1978, must be amplified somewhat.

Respondent and her late husband first contacted Ashtabula S & L to apply for a mortgage loan to enable them to purchase a dairy farm in early October, 1972. Their loan was approved, and a letter dated October 26, 1972, was sent to them, indicating a commitment to make a "loan of $60,000 for 25 years at 8% with payment each month of $463.10 NOT including taxes and insurance." With this letter there was also sent to the Davises the Regulation Z form mentioned above, that form also being dated October 26, 1972.

Upon receipt of these documents, Mr. and Mrs. Davis went to an office of Ashtabula S & L and met with one of its officers, Betty M. Hillyer.

The Regulation Z form generally summarized the terms of the financing transaction which the Davises had applied for, and indicated that "Payments for principal and interest on this transaction shall be 300 monthly payments of $463.00 . . . ." It also contained the following language:

---

2. The form was promulgated as a model by the Federal Reserve Board in 1969 in a Federal Reserve Board pamphlet entitled *What you ought to know about Federal Reserve Regulation Z*. The insurance language of the model form and the form used by Ashtabula S & L is identical. The Federal Reserve Board's model form is currently published at *CCH Consumer Credit Guide* ¶3855, reproduced at page A39 of the Appendix hereto.

OTHER INSURANCE

Credit life, accident, health or loss of income insurance is not required to obtain this loan. No charge is made for such insurance and no such insurance is provided unless the borrower signs the appropriate statement below. ..... is
(type of insurance)
available at a cost of $..... for the.....
year term of the initial policy.

I desire mortgage insurance coverage.	I DO NOT desire such insurance coverage.
.....	.....
Date Signature	Date Signature

The word "mortgage" entered on the blank appearing in the phrase "I desire ..... insurance coverage" was made by typewriter, and the blanks for the type of insurance, cost[3], and term were not filled in. At the meeting, Mr. Davis signed the form on the line below "I desire mortgage insurance" and dated his signature 10/27/72. Both the Davises signed the form in the lower right-hand corner below the words "I hereby acknowledge receipt of the *disclosures* made in *this notice*." (Emphasis added).

The Regulation Z notice is required by that regulation to be given *before* any financing transaction is consummated by any incurring of contractual obligation.[4] In fact, the contractual mortgage and note were not executed by the Davises until November 24, 1972, almost a month later.

Mortgage redemption insurance (commonly called credit life insurance), as opposed to casualty insurance,

3. The insurance would have cost about $336.00 per year.

4. 12 C.F.R. §226.2(cc), §226.8(a).

was not required by the lending institution as a condition for the loan, but, like casualty insurance, it could not be obtained under Ohio law unless a loan customer who wanted it applied directly to an insurance company for it.[5] Ashtabula S & L had available to its customers who desired mortgage redemption insurance applications in two different forms supplied by National Old Line Life Insurance Company. If a customer in fact submitted an application to the insurance company after a loan transaction closed, and if a policy was subsequently issued by the insurance company, Ashtabula S & L would thereafter increase the customer's monthly total payment to reflect the insurance premium and would remit the premiums, less a service fee, to the insurance company. The Regulation Z form did not expressly state that any insurance application would be necessary for either mortgage redemption insurance or hazard insurance if the customer after receiving the disclosure form subsequently decided that he wanted to proceed to actually obtain the loan and also to apply for the insurance.

Betty M. Hillyer, the loan officer who met with the Davises on October 27, 1972, did not remember the meeting at the time of trial, so she could not testify whether she told Mr. Davis at that time or at any other time whether he needed to complete an application and mail it to the insurance company if he finally decided that he wanted insurance on his life. However, she testified that she customarily did so indicate to a loan applicant who expressed interest in such insurance at any time. Mrs. Davis' testimony at trial merely referred to the language of the Regulation Z form and Mr. Davis' signature thereon. There

---

5. Ohio Revised Code §3915.05. Moreover, under Ohio law only a licensed insurance agent, not a financial institution, can "receive or transmit any application for life insurance". Ohio Revised Code §3905.21.

was no claim that the savings and loan officer misstated or misrepresented anything to either of the Davises. Mr. Davis, of course, was deceased and there is absolutely no evidence as to what he personally was told, knew, believed, assumed, or relied upon.

The Davises about a month subsequent to the October 27, 1972, meeting executed a note and mortgage, thereby for the first time entering into a contractual, debtor-creditor relationship, and the real estate transaction closed on November 30, 1972. The language of the mortgage note explicitly stated how the monthly payment of $463.10 would be applied, and thus excluded any possibility that any portion of a payment in that amount would be applied to mortgage redemption insurance. Upon closing, Mr. Davis signed a "loan settlement statement," and this itemized the $463.10 monthly payment to consist only of principal and interest. A place for any "mortgage insurance" payment to be itemized was left blank, and the total payment was indicated to be $463.10.

After the closing, Ashtabula S & L monthly sent to the Davises an itemized statement showing their total payment to be $463.10 itemized between principal and interest. Mrs. Davis testified that there never was any entry in the "TAX AND/OR INS." block.[6] On July 18, 1975, after receiving approximately thirty of these statements over two and one-half years, Mr. Davis died in a motorcycle accident. The Davises were three months in default on their loan at that time.

Upon Mr. Davis' death, Mrs. Davis did not commence any litigation to cancel out the loan for the lack of insurance coverage. Rather, she resumed regular monthly pay-

---

6. She also testified that both she and Mr. Davis knew that insurance was not free. No insurance premiums were ever paid.

ments to Ashtabula S & L in November, 1975, and the record shows no claim of insurance coverage by her until she filed her counterclaim to Ashtabula S & L's cross-complaint after the second mortgage holders commenced their foreclosure action in 1977.

The entire case is thus predicated upon the language of the pre-contractual Regulation Z form, and nothing more. Such fact establishes the federal constitutional and statutory issues which have been asserted at every stage of these proceedings and which furnish the basis for this petition for writ of certiorari.

Federal issues were originally generally raised in the pleadings filed in the Common Pleas Court. As noted previously, respondent based her claim on the federal Regulation Z form and incorporated a copy of the form in her pleading. In response, Ashtabula S & L expressly asserted at paragraph 7 of its answer to her claim that:

> 7. Defendant Ashtabula, as an affirmative defense, alleges that the Federal Reserve Regulation Z disclosure statement is not a contract and is not the application [for insurance] of Defendants Davis as Federal Law requires the same as a disclosure of the financing terms. . . .

The Ashtabula County, Ohio, Court of Common Pleas, wherein the action was tried, in its judgment-opinion ruled, *inter alia*:

> . . . the holding of this Court is that the signing of the Regulation Z Form with its current language creates a duty upon the bank. (App. A34).

* * * * *

One of the conditions agreed to in this case was that the disclosure statement *fully disclosed* the terms

> of the loan. . . . The language of the form was sufficiently ambiguous as to leave the borrower with the clear impression that the bank would obtain the insurance. (App. A35) (Emphasis added).

Ashtabula S & L's assignments of error to the Ashtabula County, Ohio, Court of Appeals are fully quoted in the opinion of that court (App. A19-A25). The second such assignment of error was that under which the federal issues were argued. Formal issues were set out in conformity with that court's rules by Ashtabula S & L as follows:

> (1) The Regulation Z form was a notice required by federal law, and it did not constitute a contract under Ohio state law nor does it furnish a basis for tort liability to Judy Davis, either as administratrix or individually.
>
> (2) The Truth in Lending Act contains its own exclusive remedy for noncompliance with its terms, and the application of the principles of such Act, as construed by the trial court, to the facts herein would be unconstitutional.
>
> (3) County Savings cannot be charged with any ambiguity in the Regulation Z form since it was promulgated by the Federal Reserve Board.

Upon the affirmance of the trial court's judgment by the Court of Appeals in February, 1980, the Ohio Supreme Court allowed Ashtabula S & L's motion to certify and considered the case on the merits. In accordance with the rules of the Ohio Supreme Court, Ashtabula S & L asserted general propositions of law, all of which are quoted in the opinion of the Ohio Supreme Court (App. A1). Propositions of law 1 and 3 were directed to the federal issues argued herein, and the two official syllabi of the Ohio Supreme Court's opinion (App. A1) show that such court

based its affirmance of the lower state courts' judgments squarely upon the language of the Regulation Z disclosure form and not upon any other fact or document in the case.

REASONS FOR GRANTING THE WRIT

I. Introduction.

Petitioner Ashtabula S & L is one of hundreds of savings and loan associations in Ohio, and there are hundreds of banks which do business in Ohio. Since 1969, the Federal Truth in Lending Act has applied to all transactions entered into by these institutions, and all similar institutions nationally, where loans are made to individuals for "consumer" purposes, as opposed to "business or commercial purposes."[7] One of the most common of these "consumer" loans is the mortgage financing for the purchase of residential real estate. These loans are typically written for twenty to thirty year terms.

Congress stated that the purpose of the Truth in Lending Act was:

> . . . to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. (Truth in Lending Act §102(a), 15 U.S.C. §1601(a)).

This federal Act, together with the Federal Reserve Board's Regulation Z, 12 C.F.R. §226, require that all creditors nationally make certain specific credit cost disclosures, often in precisely required terminology. The Act provides both civil and criminal penalties[8] for noncompliance by

---

7. Truth in Lending Act §§103(h), 104, 15 U.S.C. §§102(h), 1603.

8. Truth in Lending Act §§112, 130, 15 U.S.C. §§1611, 1640.

creditors. The Act and the regulation have resulted in unknown thousands of suits against creditors, in both state and federal courts, for statutory civil penalties, expressly limited to a maximum of $1,000 per transaction.[9]

Creditors such as petitioner have tried to comply with the federal Act and Regulation Z, both of which are exceedingly complex. When the Act and the Regulation first became effective, it seemed logical to lenders, especially small organizations such as Ashtabula S & L, that compliance would be achieved by the use of the model form (App. A39), widely promulgated by the same federal agency which had created the Regulation. Ashtabula S & L's form (App. A38), upon which the decisions of the Ohio courts are based, is virtually identical to the model form, including the "I desire ..... insurance" and related language. As factually demonstrated rather extensively in the statement of the case herein, it is only the naked statement of desire and related language on the form which furnishes the basis for the state courts' imposition of a liability upon petitioner exceeding by fifty or sixty times the maximum penalty imposed under the Federal Truth in Lending Act.

Since 1969, numerous financial institutions in Ohio have used the model form with that form's insurance language, and many other creditors nationally have used it. (As will be discussed subsequently, there are thus a few cases from other jurisdictions which have considered a creditor's liability for the form's language.) The decision of the Ohio Supreme Court, affirming the decisions of the lower Ohio courts, directly puts into jeopardy hundreds of mortgage loans made by Ohio lenders who used the Federal Reserve's model form since 1969. The form's language

9. Truth in Lending Act §130, 15 U.S.C. §1640.

does not provide a written record that the prospective borrower was told that an insurance application would have to be completed by him if he subsequently determined to obtain the loan and if he then still "desired" insurance. The survivor of any now deceased debtor who either intentionally or mistakenly signed the "I desire insurance" statement, no matter how many years the debtor survived after the Regulation Z notice was given, need only produce the form, state that to his or her knowledge the decedent was not told that an application was necessary, and have the subsequently made loan cancelled.

The only purpose of the form used by petitioner in 1972 in the transaction with Mr. Davis was to comply with federal requirements.[10] Unless the United States Supreme Court intervenes, petitioner and many other mortgage lenders in Ohio, and probably other jurisdictions, will suffer tremendous losses for compliance with supreme federal laws and regulations which have their own express and exclusive, but limited, penalties.

II. Both the Federal Truth in Lending Act and the Supremacy Clause of the United States Constitution Preclude the Imposition Upon a Creditor of Disclosure Duties and Liabilities Exceeding Those in the Act for the Use of a Noncontractual Truth in Lending Disclosure Form.

The relationship of debtor and creditor as it existed between petitioner and respondent is inherently and tradi-

---

10. Ohio has never had any statutory requirement that prospective creditors must inform debtor of the mechanics of applying for insurance, nor has Ohio any state disclosure requirements generally applicable to mortgage lenders. Even if there were independently existing state law disclosure requirements, no state court could penalize a creditor for failing to include additional disclosures in a Truth in Lending form since that would be entirely optional with the creditor. Truth in Lending Act §122(b), 15 U.S.C. §1632(b).

tionally contractual. Money is loaned by the creditor at the request of the debtor, and the debtor becomes obligated to repay the debt upon a promissory note for which security is given. Upon all contractual documents in this case, there is no question but that respondent has no defense or claim—it is only the Regulation Z form which furnishes a basis for the holdings of the Ohio courts that petitioner is responsible for the absence of insurance on Mr. Davis' life.

In enacting the Truth in Lending Act in 1968, Congress for the first time created the concept of "disclosure" for consumer borrowing to provide "meaningful disclosure of credit terms" so that the consumer could engage in comparison shopping. Truth in Lending Act §102, 15 U.S.C. §1601. Congress intended that all creditors nationally should disclose certain information in a uniform manner. See *Mourning v. Family Publications Service*, 411 U.S. 356, 364 (1973). However, that which Congress intended to require to be "disclosed" was only certain information specified in the Act and in the Federal Reserve Board's Regulation Z, which the courts must interpret and apply in the light of, and with deference to, the interpretations and positions of the Federal Reserve Board staff. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980); *Anderson Bros. Ford v. Valencia*, ... U.S. ..... (1981), 49 U.S.L.W. 4635 (June 9, 1981); see also *Crosby v. Mellon Bank, N.A.*, 407 F. Supp. 233 (W.D. Pa., 1976).

The Federal Reserve Board provided that the limited Truth in Lending disclosures could be made on a separate, noncontractual document, such as that used in the instant case (Regulation Z §226.8(a)). The insurance language used on the Regulation Z form herein is the same as that suggested in the Federal Reserve Board's model form, and the language of "desire" is the same as used in both the

statute and in Regulation Z (Truth in Lending Act §106(b), 15 U.S.C. §1605(b); Regulation Z §226.4(a)).

All Truth in Lending disclosures are expressly required to be made on "*one side*" of the separate statement (Regulation Z §226.8(a)(2)). Obviously, there are limitations as to how much information can be put on one side of a single sheet of paper in a legible type size.[11] A Truth in Lending statement cannot be, and is not required to be, a complete and comprehensive course in commercial and insurance law.

A Truth in Lending disclosure form must be given *before* a transaction is "consummated" (Regulation Z §226.8(a)), and a transaction is not consummated until there is a contract (Regulation Z §226.2(cc)). Thus, at the time the form in this case was given, there was no legal relationship whatsoever between petitioner and Mr. and Mrs. Davis—they were merely applicants for credit and they were free to shop elsewhere for other credit terms. Only subsequently, when they signed the note and mortgage, did they become debtors, and petitioner became the creditor. The holding of the Ohio Supreme Court that the delivery of the Truth in Lending form *before* there was a debtor-creditor relationship turned a subsequent contractual relationship into a fiduciary relationship with liability for "negligence" in not making further disclosures is at complete variance with the purposes and provisions of the Truth in Lending Act.

As discussed above, the disclosure requirements of Truth in Lending are limited. Similarly, the effects of the

---

11. Actually, Regulation Z contains type size requirements, and all disclosures must be "made clearly, conspicuously", etc. (Section 226.6). Moreover, the inclusion of additional information may detract from the federal disclosures or be confusing, resulting in a Truth in Lending violation. See *LaGrone v. Johnson*, 534 F.2d 1360 (9th Cir., 1976).

Act, even if violated, are expressly limited by Congress. Thus, Section 111 of the Act (15 U.S.C. §1610) provides that the Act does not:

> (a) *affect* . . . the laws of any state relating to the disclosure of information . . .
>
> (b) . . . annul, *alter* or *affect in any manner* the meaning, scope, or applicability of the laws of any State . . .
>
> * * * * *
>
> (d) . . . *affect* the validity or enforceability of any contract or obligation . . . (Emphasis added).

Section 130 of the Act (15 U.S.C. §1640) limits the penalty for a violation of Truth in Lending to a maximum of $1,000.00, but this case involves a situation where a creditor is penalized for *compliance* with the Act in an amount exceeding many times the statutory maximum for a violation, all in disregard by the Ohio courts of the Act's express provisions that its requirements shall not "affect" state laws and contract rights.

The Act requires that disclosures be made in accordance with the Federal Reserve Board's regulations[12]—and these regulations provide that disclosure shall be made on one side of one piece of paper.[13] That is what was done by petitioner in giving the form, but the Ohio courts used the Act and the form given in compliance therewith to "affect" the subsequently resulting debtor-creditor relationship and the contractual rights of the parties.

The trial court herein, in an opinion subsequently approved by the Court of Appeals as "a detailed, well-written

---

12. Truth in Lending Act §121, 15 U.S.C. §1631.

13. Regulation Z §226.8(a).

analysis" and by the Ohio Supreme Court as "well-written, [and] carefully considered" (App. A22-A15), clearly based its holding on a view that the Truth in Lending Act requires a broad range of disclosures not specified therein:

> One of the conditions agreed to in this case was that the disclosure statement fully disclose the terms of the loan. (App. A35)

While this case was on appeal in the Ohio courts, the United States Supreme Court decided *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), which decision precluded such an extension of the Act. In order to reach the result it wanted to reach, and to avoid the limitation of *Milhollin*, the Ohio Supreme Court used the Truth in Lending form to change a contractual creditor into a "fiduciary" with liability for "negligence" for not going beyond the Truth in Lending required disclosures. This fiction, nonetheless, affects state laws and contractual rights. It is only the Truth in Lending form which can create the need for additional disclosures, and it is the separate, noncontractual form which the Ohio courts have used to turn a subsequent contractual relationship into a fiduciary one.[14] Petitioner submits, however, that the Supremacy Clause of the United States Constitution[15] requires that the Ohio state courts give deference to the provisions of the Truth in Lending Act limiting its effect and its penalties. Compliance with federal law cannot constitutionally be the basis for a state law liability.

---

14. Ohio courts have traditionally viewed the relationship of debtor and creditor as merely contractual and non-fiduciary. *Umbaugh Pole Building Co. v. Scott*, 58 Ohio St. 2d 282, 390 N.E.2d 320 (1979). An arm's length lending or business relationship logically per se precludes the existence of any "fiduciary" relationship. *Snow v. Merchants National Bank of New Bedford*, 309 Mass. 354, 35 N.E.2d 213 (1941).

15. U.S. Const., Art. VI (cl. 2).

III. The Ohio Supreme Court's Retroactive Creation of Disclosure Requirements and Modification of Contract Rights Between a Debtor and a Creditor Predicated Upon the Language of the Federal Regulation Z Form Is Also Both Violative of Petitioner's Due Process Rights and Contrary to the Decisions of Other Courts.

The Ohio Supreme Court in one critical passage of its decision held that the above discussed provisions of the Truth in Lending Act limiting the effect of the Act and its penalties did not prevent a state court from "formulati ' additional disclosure requirements based on the form, and that factually analogous cases from other jurisdictions were not controlling:

> We find, contrary to appellant's arguments, that our holding is supported by the existence of federal truth in lending law. In the enactment of this legislation on loan disclosure aimed at promoting the informed use of credit, Congress implicitly recognized that, in matters integrally related to the complex loan processing procedure utilized in the modern banking system, the principle of freedom of contract must be aided, the arm's length bargaining assisted, by imposing certain duties of disclosure upon banks. Moreover, Congress expressly provided that its disclosure scheme was not intended to preclude the States from formulating their own disclosurer (sic) requirements, so long as they were not inconsistent with the federal scheme. Section 1610, Title 15, U.S. Code. Therefore, we find the cases from other jurisdictions cited by appellant, in support of the proposition that use of a Regulation Z disclosure form, approved by the Federal Reserve Board as sufficient to satisfy the requirement of truth in lending law, cannot give rise to a

cause of action under State law in tort or contract, to be inapposite or, at best, unpersuasive. See *Burgess v. Charlottesville S. & L. Assn.*, (D.C. W.D. Va. 1972), 349 F. Supp. 133, remanded at 477 F.2d 40 (C.A. 4, 1973); *Peer v. First Federal S. & L. Assn. of Cumberland* (1975), 273 Md. 610, 331 A.2d 299, and *In re Estate of Johnson* (1975), 195 Neb. 131, 236 N.W.2d 838. But, see, *Bass v. Home Federal S. & L. Assn.* (1979), 266 Ark. 770, 587 S.W.2d 48. (App. A8-A9)

In the first instance, in view of Congress' express limitation of the Truth in Lending Act's effect on state laws and contract rights, it is impossible that Congress could have intended that state *courts* could ignore those limitations and retroactively "formulate" additional disclosure requirements applicable to existing transactions based upon the federal disclosure requirements and forms used to make such federal disclosures. A state court cannot logically find a state "common law" obligation to "disclose" information based upon disclosures made only in compliance with express federal statutory and regulatory requirements.

Secondly, a state *legislature* might enact "disclosure" requirements in addition to those established by the Truth in Lending Act and require that *thereafter* lenders give a separate statement of *those* disclosures. That would be consistent with both the federal Truth in Lending Act and the United States Constitution, but neither a state legislature nor a state court can retroactively create disclosure requirements and liabilities applicable to completed transactions. The due process requirements of the Fourteenth Amendment to the United States Constitution are as applicable to state courts as they are to state legislatures, and federal substantive due process requires that there be some advance warning of the circumstances under

which penalties and liabilities will be imposed so that measures to avoid liability can be taken. Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Lambert v. California*, 355 U.S. 225 (1957).

Burgess v. Charlottesville S. & L. Assn., 349 F. Supp. 133 (W.D. Va., 1972), *remanded* 477 F.2d 40 (4th Cir., 1973), which the Ohio Supreme Court found "inapposite" and "unpersuasive", applied Virginia law in an extensive and coherent opinion to facts essentially identical to those involved in this case. The district court concluded that the insurance language and statement of desire in the Regulation Z form could create no liability under Virginia law on either contract or tort theories, contrary to the holdings of the Ohio courts herein. The United States District Court in *Burgess* held, *inter alia*, that "it is not the purpose of the Act to require a lending institution to procure credit life insurance or to agree to procure credit life insurance". (349 F. Supp. at 141). The Fourth Circuit Court of Appeals subsequently remanded the case to state court since, as in the instant case, no Truth in Lending claim was alleged. (However, it also appears that no *defense* under the federal Act was alleged or argued, as petitioner has done throughout this litigation.) The Fourth Circuit Court of Appeals did, however, note:

> Though not essential to the determination of this case, a proper construction of the Act indicates that any private action for violation thereof is limited to the statutory remedy and can provide no basis for other relief. (477 F.2d at 45).

In *Peer v. First Federal S. & L. Assn.*, 273 Md. 610, 331 A.2d 299 (1975), Maryland's highest court followed the analysis of the district court in *Burgess*, concluding that the Regulation Z form could create no liability under

Maryland state law: "The very language of the Regulation Z form eschews obligation." (331 A.2d at 302).

Neither of the other two reported decisions involving a claim of liability predicated upon the Regulation Z insurance disclosure language contains much detailed analysis. *In re Estate of Johnson*, 195 Neb. 131, 236 N.W.2d 838 (1975) reflects a decision by the Nebraska Supreme Court which simply rejected the contention that the precatory "I desire insurance" language imposed liability, even though in that case the language was on the note itself. *Bass v. Home Federal S. & L. Assn.*, 266 Ark. 770, 587 S.W.2d 48 (Ark. App. 1979) demonstrates only a vague determination by an Arkansas appellate court that a jury could speculate as to what a decedent might have believed, and the opinion contains no reference to other cases or to the Truth in Lending Act's provisions.[16] Nonetheless, this latter case shows the confusion and conflicts among the various state courts as to the legal significance of a separate federal Regulation Z disclosure form, which has been involved in literally millions of transactions since 1969, and the consequences thereof to creditors, especially in Ohio and Arkansas, who have untold numbers of long-standing loans in jeopardy.

CONCLUSION

Commencing with its initial pleading in response to the claim of respondent, throughout the Ohio courts petitioner has asserted that the Regulation Z form upon which respondent's case is based was not part of the subsequent contract, and that its use only to comply with federal

16. The 1979 reported decision in *Bass* remanded the action for a new trial. That litigation is now concluded and no further appeal remains.

Truth in Lending requirements precludes the imposition of non-Truth in Lending liabilities upon it. The Ohio courts have disagreed, but courts in other jurisdictions have found that the form's language does not create, change or supercede contractual relationships. Important federal constitutional and statutory issues are directly involved in this nationwide conflict, and resolution by the United States Supreme Court is both appropriate and essential.

For all of the above reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ohio Supreme Court.

Respectfully submitted,

JOHN A. HALLBAUER
Counsel of Record
PARKS, EISELE, BATES & WILSMAN
1100 The Illuminating Building
Cleveland, Ohio 44113
(216) 241-2840
Attorneys for Petitioner

APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided April 22, 1981)

No. 80-585

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

GEORGE L. STONE *et al.*,
Plaintiffs,

vs.

JUDY V. DAVIS *et al.*,
Appellees

ASHTABULA COUNTY SAVINGS & LOAN COMPANY,
Appellant.

1. A lending institution using a Federal Reserve Board Regulation Z disclosure form and eliciting from a loan customer a written express desire for mortgage insurance has a duty to advise the customer as to how the insurance may be procured.

2. Where a mortgage loan customer indicates on the Regulation Z form a desire for mortgage insurance and thereafter the lending institution neglects to point out the procedure to be followed and to advise the customer that he must procure the insurance himself by directly applying to a mortgage insurance company, the lending institution may be held liable for any proximately caused injury to the customer resulting from such negligence.

APPEAL from the Court of Appeals for Ashtabula County.

This cause originated as a foreclosure action filed in the Court of Common Pleas of Ashtabula County by George and Clara Stone, sellers and mortgagees of a dairy farm located in Austinburg Township, Ashtabula County, against appellee Judy V. Davis, one of the purchasers and mortgagors of the farm, and other individuals and entities holding alleged lien interests in the farm, including appellant Ashtabula County Savings & Loan Company (hereinafter "Ashtabula S & L").

In 1972, Danny I. Davis and his wife, Judy Davis, 21 and 19 years old respectively, negotiated with the Stones for the purchase of their dairy farm in Ashtabula County. In order to finance the major part of this purchase, the Davises applied to Ashtabula S & L (since merged with Cardinal Federal Savings & Loan) for a $60,000 mortgage loan.

By letter dated October 26, 1972, Ashtabula S & L notified the Davises that it had approved their mortgage loan application.[1] On the day following the making of its loan commitment to the Davises, Ashtabula S & L presented them with a document entitled "Notice to Customers Required by Federal Law, Federal Reserve Regulation Z," which contained an itemization of the costs of their loan. The Davises acknowledged receipt of this disclosure form on October 27, 1972, by dating and affixing their signatures to it.

---

1. The Davises subsequently agreed to the terms of the loan proposed by Ashtabula S & L, and the latter agreed to act as escrow agent in the sale of the farm. The sale was apparently consummated on November 30, 1972, when a deed conveying the farm to the Davises was filed with the Ashtabula County Recorder.

Relevant to the instant controversy, the following language appeared within the disclosure form concerning the subject of "Other Insurance":

"Credit life, accident, health or loss of income insurance is not required to obtain this loan. No charge is made for such insurance and no such insurance is provided unless the borrower signs the appropriate statement below. ———— (type of insurance) is available at a cost of $ ———— for the ———— year term of the initial policy."

Below this language appeared the following juxtapositional statements: "I desire ———— insurance coverage," and "I DO NOT desire such insurance coverage." Underneath each of these statements were two blank lines for a date and a signature.

In the disclosure form presented to the Davises, the word "mortgage" had been typed onto the blank space of the first statement. On the lines under this statement, Danny Davis signed his name and entered the date "10/27/72."

What transpired next in connection with Danny Davis' expressed desire for mortgage insurance was disputed by the parties to this controversy. The trial court, however, found that Ashtabula S & L thereafter neither took any steps to procure mortgage insurance for Danny Davis nor advised Davis that he was to procure the insurance himself. In any event, no mortgage insurance was ever obtained for Davis.

Thereafter, the sale of the Stones' property to the Davises was completed, and they began operation of the dairy farm. In the Spring of 1975, the Davises encountered business difficulties when their herd of dairy cows contracted a reproductive disease which required that it be

sold. As a result of this problem, the Davises fell behind on their mortgage payments to both their sellers, the Stones, who had financed part of the purchase price of the farm, and Ashtabula S & L. The Davises were three months in default on these mortgages when, on July 18, 1975, Danny Davis died as a result of injuries he sustained in a motorcycle accident.

Following her husband's death, Judy Davis made some 30 additional monthly mortgage payments to Ashtabula S & L, but her loan nevertheless remained in default. The Stones thereupon instituted this foreclosure action in the Court of Common Pleas on June 20, 1977.

After filing answers to the Stones' complaint, appellant Ashtabula S & L and appellee Davis cross-claimed against each other. In its cross-claim, Ashtabula S & L alleged that Judy Davis was indebted to it on the remaining balance of a $60,000 mortgage loan it had made to her and her deceased husband Danny Davis to finance part of the purchase price of the Stones' farm.

In her cross-claim, Judy Davis alleged that Ashtabula S & L, either negligently or in breach of a promise to do so, had failed to procure mortgage insurance for her husband Danny; that, as a proximate result, when Danny Davis died in an accident in 1975, he was not covered by any mortgage insurance; and that Ashtabula S & L was therefore liable to her for the amount of the lost mortgage insurance proceeds.

Appellant's and appellee's cross-claims were severed from the other claims in the Stones' foreclosure action and tried without a jury to the common pleas court. At the time of the trial of the parties' cross-claims in October 1978, Judy Davis' account with Ashtabula S & L showed a principal balance of $58,572.08 and accrued interest of $2,-

780.55 on the original $60,000 loan she and her husband had taken out in October 1972.

The trial court rendered a judgment for Judy Davis, holding that Ashtabula S & L had breached a duty to inform the Davises that they had to procure mortgage insurance themselves if they so desired it, and was therefore liable to Judy Davis for her loss of mortgage insurance proceeds.[2]

On appeal, the Court of Appeals affirmed the trial court's judgment.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

MR. FRANK R. BODOR, for appellee.

MESSRS. PARKS, EISELE, BATES & WILSMAN and MR. JOHN A. HALLBAUER, for appellant.

CORRIGAN, J. In this appeal, Ashtabula S & L advances six propositions of law which are considered *infra*.

I.

Propositions of law Nos. 1 through 3, which may be treated together, read as follows:

"[1.] A federal truth-in-lending Regulation Z disclosure form promulgated by the Federal Reserve Board does not render a creditor using such form liable under Ohio law in either contract or tort for the non-existence of insurance for which a debtor has indicated his 'desire' on the disclosure form.

"[2.] A lending institution dealing at arm's length with a prospective borrower prior to the creation of any debtor-creditor or other contractual relationship has no tort

2. This judgment was made final by the trial court pursuant to the provisions of Civ. R. 54(B).

law duty to affirmatively advise and counsel the prospective debtor as to the legal mechanics or the legal consequences of either the prospective lending transaction or collateral matters.

"[3.] The Federal Truth-in-Lending Act contains and creates its own exclusive remedies and liabilities, and an Ohio court's application of the Act and of forms promulgated thereunder by a federal agency in disregard of the Act's express limitations upon liability is violative of both the federal and the Ohio Constitutions."

The major thrust of the arguments underlying these propositions of law is that a lending institution, which complies with the disclosure requirements of federal truth-in-lending law (Sections 1601 *et seq.*, Title 15, U. S. Code) and, in so doing, notifies its loan customer that procurement of mortgage insurance is not a condition for the loan and need be purchased only if the customer so desires, does not, upon eliciting from the customer an expressed desire for mortgage insurance, assume a further duty to disclose to the customer how such insurance may be procured. We do not accept appellant's argument as a correct statement of Ohio law, and, for the reasons which follow, we hold instead that a lending institution does assume this further duty of disclosure and, in negligently failing to observe this duty, may become liable for any injury to the customer proximately caused.

In *Umbaugh Pole Bldg. Co. v. Scott* (1979) 58 Ohio St. 2d 282, we recognized that, in most instances, the relationship of a creditor to his debtor, governed by the principles of freedom of contract, was not a fiduciary relationship. There, we held that evidence which revealed that the creditor had given advice to the debtor concerning the operation of the debtor's business was insufficient to trans-

form what was otherwise a business relationship into a fiduciary relationship. In so holding, we conclude that, in the matter upon which the advice there was rendered, the parties were operating at arm's length, each seeking to protect his own legitimate business interests. *Id.*, at page 287.

The facts are different in the case *sub judice* and more compelling of a conclusion that, in broaching the subject of mortgage insurance, Ashtabula S & L was acting as a fiduciary to Danny and Judy Davis, its loan customers.

"A 'fiduciary relationship' is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *In re Termination of Employment* (1974), 40 Ohio St. 2d 107, 115. A fiduciary relationship need not be created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed. *Umbaugh, supra.*

The facts surrounding and the setting in which a bank gives advice to a loan customer on the subject of mortgage insurance warrant a conclusion that, in this aspect of the mortgage loan process, the bank acts as its customer's fiduciary and is under a duty to fairly disclose to the customer the mechanics of procuring such insurance.

We observe that, while a bank and its customer may be said to, stand at arm's length in negotiating the terms and conditions of a mortgage loan, it is unrealistic to believe that this equality of position carries over into the area of loan processing, which customarily includes advising the customer as to the benefits of procuring mortgage insurance on the property which secures the bank's loan.

In the case before us, Judy Davis and her husband Danny came to Ashtabula S & L as a young married couple, apparently encountering the complex mortgage loan process for the first time in their lives. Undoubtedly, their every action in assisting the expeditious processing of their loan was guided by officers of Ashtabula S & L, upon whom they justifiably relied as experts in the field of loan processing. When Ashtabula S & L broached the subject of mortgage insurance and elicited an expressed desire for it by Danny Davis, both sides to the loan transaction must have understood that a special trust or confidence had been reposed in Ashtabula S & L to advise and assist the Davises in procuring the insurance. When Ashtabula S & L negligently failed to adhere to its customary policy of informing the Davises that they must procure the mortgage insurance themselves, it breached the fiduciary duty of fair disclosure which it owed to them.

We find, contrary to appellant's arguments, that our holding is supported by the existence of federal truth-in-lending law. In the enactment of this legislation on loan disclosure aimed at promoting the informed use of credit, Congress implicitly recognized that, in matters integrally related to the complex loan processing procedure utilized in the modern banking system, the principle of freedom of contract must be aided, the arm's length bargaining assisted, by imposing certain duties of disclosure upon banks. Moreover, Congress expressly provided that its disclosure scheme was not intended to preclude the States from formulating their own disclosurer requirements, so long as they were not inconsistent with the federal scheme. Section 1610, Title 15, U. S. Code. Therefore, we find the cases from other jurisdictions cited by appellant, in support of the proposition that use of a Regulation Z disclosure form, approved by the Federal Reserve Board as sufficient to satisfy the requirement of truth-in-lending law, cannot give

rise to a cause of action under State law in tort or contract, to be inapposite or, at best, unpersuasive. See *Burgess v. Charlottesville S. & L. Assn.* (D.C. W.D. Va. 1972), 349 F. Supp. 133, remanded at 477 F. 2d 40 (C.A. 4, 1973); *Peer v. First Federal S. & L. Assn. of Cumberland* (1975), 273 Md. 610, 331 A.2d 299; and *In re Estate of Johnson* (1975), 195 Neb. 131, 236 N.W. 2d 838. But, see, *Bass v. Home Federal S. & L. Assn.* (1979), 266 Ark. 770, 587 S.W. 2d 48.

We further find support for our holding in the recognition that banks do not act as disinterested experts in advising loan customers of the availability of mortgage insurance, but instead have a direct pecuniary interest in inducing the customer to procure it. Mortgage insurance serves to protect the bank's investment in a loan by providing a ready source of funds for the loan's repayment should the debtor subsequently suffer an untimely death. Furthermore, as was brought out in testimony presented at the trial of the case now before us, banks often act as collection agents for mortgage insurance, adjusting their debtor's payment schedule to include payment of the insurance premiums and then remitting the collected premiums to the insurance company, receiving in return a percentage commission for this service.

In light of all the foregoing considerations, we hold that, in broaching the subject of mortgage insurance to a loan customer, a lending institution has a duty to advise the customer as to how this insurance may be procured. Where, as in the instant case, a bank uses a Regulation Z disclosure form to elicit from a customer his desire for mortgage insurance and thereafter negligently fails to further advise the customer that he must procure it himself, the bank breaches its duty of disclosure, and may be held liable for any proximately caused injury to the customer resulting from such negligence.

Our holding today is not at odds with our longstanding decision in *Patten v. Continental Casualty Co.* (1954), 162 Ohio St. 18, in which we held, in paragraph one of the syllabus that, "[o]rdinarily, an applicant for a policy of casualty insurance, who pays the premium at the time of the application, may not, in an action in tort, recover from an insurer damages resulting from the failure of the insurer to act upon such application within a reasonable time". There, we were not presented with the issue of whether the applicant and the insurance company were in fiduciary relationship.

Finally, we find no merit in appellant's argument that whatever duty of disclosure it may have owed the Davises, the duty ended with Danny Davis' death. This argument incorrectly apprehends the scope of a bank's duty of disclosure to its loan customers, which certainly encompasses the spouse who is a co-debtor of the mortgage loan and also the intended beneficiary of the mortgage insurance which is to be procured.

II.

Propositions of law Nos. 4 and 5, which may also be treated together, read as follows:

"[4]. It is inconsistent with any rational principle or theory of compensatory damages that a party to litigation should be put in a far better position than if the basis for litigation had not occurred.

"[5]. Whether in contract or in tort, a party who has the burden of proof on an issue must prove (1) the existence of a duty recognized in law and owed by the adverse party to the party seeking recovery, (2) a breach of that duty, and (3) that such breach was the proximate cause of ascertainable damages; and where other causes

not under the control of the defending party could reasonably have also caused the loss, the party seeking recovery must further affirmatively prove by a preponderance of the evidence that such other matters were not the cause of the loss."

Under these propositions of law, appellant advances two arguments which, in essence, challenge the trial court's finding that appellant's negligence was the sole and proximate cause of Judy Davis' injury.

Appellant initially submits that Davis failed, as a matter of law, to meet her burden of proving proximate causation, because she failed to exclude the effectiveness of two other possible causes of her injury, viz., that, first, had appellant advised the Davises as to how they might procure mortgage insurance, the mortgage insurer might have rejected any application it received from Danny Davis; and that, secondly, had Danny Davis procured mortgage insurance, it would have been canceled prior to his death for nonpayment of premiums when the Davises defaulted on their mortgage payments to appellant three months prior to Danny Davis' death. See *Gedra v. Dallmer Co.* (1950), 153 Ohio St. 258.

The language in *Gedra, supra,* which states that a plaintiff must "exclude the effectiveness" of other possible causes of an injury for which the defendant is not legally responsible, simply means that his evidence must be such that a trier of fact may reasonably determine that it is more likely than not that the defendant's negligence was the cause of the plaintiff's injury. See *Cooper v. Sisters of Charity* (1971), 27 Ohio St. 2d 242, 249-52. Otherwise stated, the assigned cause of the injury must be more probable than the totality of other possible causes interjected by the evidence produced at trial.

We conclude that appellee's evidence was sufficient to enable a trier of fact to determine that appellant's negligence was the proximate cause of the injury.

While, as appellant has pointed out, a mortgage insurer would have been under no duty to have accepted any application by Danny Davis for mortgage insurance, we believe that a trier of fact presented with evidence that Danny Davis was an apparently healthy, 21 year old at the time such an application would have been made, could reasonably have found that the possibility that his application would have been rejected was exceedingly remote.

The trier of fact could also have reasonably found that the possibility that any mortgage insurance procured by Danny Davis would thereafter have lapsed prior to Davis' death was remote.

Evidence was adduced at the trial of this case tending to show that, had Danny Davis procured mortgage insurance, Ashtabula S & L would have offered to collect the premiums on his behalf, remit the collected premiums every six months to Davis' mortgage insurer, and adjust Davis' mortgage payments accordingly. The possibility of a lapse in coverage for any mortgage insurance Davis might have procured was thus conditional upon the occurrence of the following sequence of events: first, that a decision by Davis had been made to permit Ashtabula S & L to collect and remit Davis' premiums to his mortgage insurer; second, that the payment of a six-month premium had come due during the period that Davis was in default of his mortgage loan with Ashtabula S & L; and third, that Davis, upon receiving notice that his insurance coverage has lapsed, had failed to renew the policy during the statutorily mandated grace period.

In light of the remoteness of these two other possible causes for Judy Davis' injury, we conclude that the trial court, sitting as trier of fact, could reasonably have found that appellee had met her burden of proving that appellant's negligence was more likely than not the proximate cause of her loss of mortgage insurance proceeds.

In its second argument concerning the issue of proximate cause, appellant submits that the Davises' failure to have discovered, prior to Danny Davis' death, that mortgage insurance had never been procured for Danny by Ashtabula S & L, and the continuation of mortgage payments by Judy Davis after her husband's death, demonstrate that Judy Davis failed at trial to meet her burden of proving that appellant's breach of its duty to advise its loan customers, as to how mortgage insurance may be procured, was the proximate cause of her injury. In this argument, although it does not expressly designate the issue as such, appellant, in essence, asserts that the Davises' conduct in relying upon Ashtabula S & L constituted contributory negligence barring Judy Davis from recovery on her claim.

Whether a plaintiff's own conduct, in the events leading up to his injury, constitutes contributory negligence is ordinarily an issue for the trier of fact to resolve, unless reasonable minds could only conclude that the conduct revealed a want of ordinary care to protect oneself from injury and, in fact, contributed to the causation of the injury suffered. See, generally, *Brinkmoeller v. Wilson* (1975), 41 Ohio St. 2d 223; *Bahm v. Pittsburg & Lake Erie Rd. Co.* (1966), 6 Ohio St. 2d 192; *Grossnickle v. Village of Germantown* (1965), 3 Ohio St. 2d 96; *Cincinnati Traction Co. v. Forrest* (1905), 73 Ohio St. 1, 5; *Baltimore & Ohio Rd. Co. v. Whitacre* (1880), 35 Ohio St. 627; and *Robison v. Gary* (1976), 28 Ohio St. 241. Cf. *Posin v. A.B.C. Motor*

Court Hotel (1976), 45 Ohio St. 2d 271; and *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St. 2d 176.

In the case *sub judice*, the only undisputed evidence offered at trial on the issue of the Davises' contributory negligence tended to establish the fact that, from October 1972 until Danny Davis' death in July 1975, the Davises never discovered that Ashtabula S & L had not procured mortgage insurance on their behalf as they had believed it had, and that thereafter Judy Davis continued to make mortgage payments to Ashtabula S & L until the Stones instituted their foreclosure action against her. While we concur that proof of these facts was highly probative of negligence on the Davises' part, we are not prepared to conclude that it demonstrated negligence as a matter of law. In light of the fiduciary relationship, which we have found to have existed in this aspect of appellant and appellees' business relationship, and the complexity of the loan process, which we above alluded to, a trier of fact could reasonably have found that the Davises did not fail to exercise ordinary care in believing that Ashtabula S & L had procured mortgage insurance for them in connection with the loan it had made to them in 1972.

Therefore, we conclude that appellee did not, as a matter of law, fail to present sufficient evidence to support her burden of proving that appellant's negligence was the sole and proximate cause of her injury.

III.

Appellant's finally considered proposition of law No. 6 reads as follows:

"A trial court in a civil, non-jury matter has a mandatory duty to state separately its findings of fact from its conclusions of law upon a clear and timely request of any

party directed to the court, and a general opinion and judgment entry containing factual material interspersed with legal principles and conclusions is not compliance with Civil Rule 52."

In rendering its judgment for appellee below, the trial court set forth its factual findings and legal conclusions in a well-written, carefully considered opinion. Thereafter, in overruling appellant's request for findings of fact and conclusions of law pursuant to Civ. R. 52, the trial court stated that its opinion satisfied the requirements of this rule.

Civ. R. 52 expressly provides that an opinion or memorandum of decision entered in an action by a trial court may satisfy its requirements, if it contains findings of fact and conclusions of law "stated separately."

In *In re Schoeppner* (1976), 46 Ohio St. 2d 21, at page 23, this court found that a trial court's ruling which recited various facts and a legal conclusion satisfied the requirements of Civ. R. 52, where, when considered together with other parts of the trial court's record, it formed an adequate base upon which to decide the narrow legal issue presented.

We, similarly, in the case before us, conclude that the trial court's opinion satisfied the requirements of Civ R. 52. In so concluding, we observe that the parties to the trial stipulated to a number of the relevant facts and did not dispute the evidence of most of that which remained. The major disputed fact at trial, viz., whether any officer of Ashtabula S & L had ever informed the Davises as to how mortgage insurance might be procured, was clearly resolved in appellee's favor and so stated in the court's opinion.

Moreover, the trial court's opinion explicitly revealed the court's legal conclusion that Ashtabula S & L's negligence in failing to inform the Davises as to how they might procure mortgage insurance was the proximate cause of Judy Davis' loss of insurance proceeds.

Accordingly, we find, as we did in *In re Schoeppner, supra*, that the trial court's overruling of appellant's request for findings of fact and conclusions of law was not contrary to the provisions of Civ. R. 52.

Finding no merit in any of the arguments advanced by appellant, we affirm the judgment of the Court of Appeals.

Judgment affirmed.

CELEBREZZE, *C.J.*, W. BROWN, *P.* BROWN, LOCHER, HOLMES and C. BROWN, *JJ.*, concur.

CORRIGAN, *J.*, of the Eighth Appellate District, sitting for SWEENEY, *J.*

ORDERS OF THE SUPREME COURT OF OHIO

(Filed April 22, 1981)

No. 80-585

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

GEORGE L. STONE *et al.*,

vs.

JUDY V. DAVIS *et al*,
Appellee,

ASHTABULA COUNTY SAVINGS & LOAN CO.,
Appellant.

To the Honorable Common Pleas Court Within and for the County of Ashtabula, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

THOMAS STARTZMAN,
Clerk

May 6, 1981

/s/ SAM F. ADKINS
Deputy

No. 80-585

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

GEORGE L. STONE *et al.*,

vs.

JUDY V. DAVIS *et al*,
Appellee,

ASHTABULA COUNTY SAVINGS & LOAN CO.,
Appellant.

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Ashtabula County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Ashtabula County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of May 6, 1981.

THOMAS L. STARTZMAN
Clerk

/s/ SAM F. ADKINS
Deputy

OPINION OF THE COURT OF APPEALS OF ASHTABULA COUNTY, OHIO

(Dated February 19, 1980)

No. 988

COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT
COUNTY OF ASHTABULA

GEORGE L. STONE, *et al.*,
Plaintiff

vs.

JUDY V. DAVIS, *et al.*,
Defendants-Appellees,

and

ASHTABULA COUNTY SAVINGS & LOAN COMPANY,
Defendant-Appellant

OPINION

DATED: February 19, 1980

HOFSTETTER, *J.*

Defendant-appellee Judy V. Davis, in her dual role as mortgagor, and administratrix of the estate of her deceased husband, filed a cross-claim against defendant-appellant Ashtabula County Savings & Loan Company, hereinafter referred to [2] as S & L. The issues therein were determined in her favor by the trial court in a final order comporting with Civil Rule 54(B).

Factually, the appellee Judy V. Davis and her husband bought a cattle farm in Ashtabula County. The initial

financing for the farm came from appellant S & L in October of 1972. As appellant noted at page 3 of its brief, the great majority of facts are undisputed. Appellee and her husband went to appellant on October 27, 1972, to complete paperwork for the approved loan. Pursuant to the law, the Davises were requested to sign the Federal Reserve Regulation Z form. In part, Regulation Z states, "no charge is made for such insurance and *no such insurance is provided unless* the borrower signs the appropriate statement below." (Emphasis added.) Mr. Davis did, in fact, sign the appropriate statement requesting mortgage insurance for credit life, accident, health, or loss of income coverage. He left unsigned the statement by which he could have denied a desire for said insurance. Mrs. Davis contends that neither she nor her husband were informed that, despite the language in Regulation Z, they had to procure their own insurance. The S & L made available a line of insurance to customers so desiring coverage, although the S & L appears to have conducted such business as the agent for the insurance company. The S & L's employee who met with the Davises could not remember the specific meeting and her testimony was not overly helpful. Nevertheless, it appears as if Mr. and Mrs. Davis left the S & L under the impression that, by having requested insurance on the [3] Regulation Z form, it would be provided. The Davises, thereafter, made no attempt to secure insurance elsewhere.

The Davises met all payments through April of 1975. Because of problems on the farm, the May and June payments were delinquent. On July 18, 1975, however, appellee's husband died, at the age of 23, from injuries sustained in a motorcycle accident. Thereafter, appellee, in November of 1975, resumed mortgage payments to appellant.

In appellant's answer below, it filed a cross-complaint against appellee alleging that the Davises "have not made payments on said note according to its tenor; that plaintiff elects to declare the entire balance (of $60,573.86) of said note due . . ." After appellee's counterclaim was filed, the case was tried on October 11, 1978. On January 10, 1979, the trial court rendered its opinion and judgment. Appellant thereafter moved the Court for separate findings of fact and conclusions of law. This motion was denied. It is from the lower court's judgment imposing a duty on appellant to inform the mortgagor that the latter had to obtain mortgage insurance, and holding said S & L liable for the loss to appellee which insurance would have covered, that the present appeal arises.

The appellant has assigned six errors. The First is that:

> THE TRIAL COURT ERRED IN REFUSING TO SEPARATELY STATE ITS CONCLUSIONS OF FACT FOUND SEPARATELY FROM ITS CONCLUSIONS OF LAW UPON THE TIMELY REQUEST THEREFOR BY APPELLANT AS REQUIRED BY CIVIL RULE 52.

After the trial court's entry of its six-page opinion and judgment on January 10, 1979, appellant timely moved the Court [4] for separate findings of fact and conclusions of law as provided in Civ. R. 52. The trial court apparently felt that its judgment fell within that part of Rule 52 which states, "an opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule . . ." Appellant's motion, therefore, was overruled. Although the trial court's overruling of the motion may not have

been the best choice, it has not resulted in prejudicial error to appellant. The trial court's opinion and judgment is a detailed and well written analysis of the case. It reviews the most salient arguments made by both sides and it clearly presents the foundation upon which the Court's ultimate decision was reached. As all sides admit, the facts in this case are, for the most part, not in dispute. We hold, therefore, that the trial court's opinion is sufficiently comprehensive to provide appellant a solid basis from which to prosecute the present appeal. Neither party cites the case of In ré Schoeppner, 46 Ohio St. 2d 21, 345 N.E. 2d 608 (1976), which states:

> The "Ruling" in question is not entitled "Findings of Fact and Conclusions of Law," and does not contain separate statements of fact and law. The "Ruling" does, however, recite various facts and a legal conclusion. The "Ruling" specifically states, "[f]rom these facts, it is the opinion of the court that . . ." In our judgment, this document sufficiently complies with the mandate of Civ. R. 52, and, when combined with other parts of the record, forms an adequate base upon which to decide the narrow legal issue presented. (In re Schoeppner, at 23)

[5] In light of the language used by the Ohio Supreme Court in construing Civ. R. 52, we find appellant's First Assignment of Error is without merit.

Appellant's Second Assignment is that:

THE TRIAL COURT ERRED IN HOLDING THAT THE REGULATION Z NOTICE FORM CREATED A DUTY UPON COUNTY SAVINGS AND THAT THE SIGNING OF SUCH FORM, COUPLED WITH FAILURE TO INFORM DANNY DAVIS THAT AN INSURANCE APPLICATION HAD TO BE MADE, RENDERED COUNTY SAVINGS LIABLE IN THE FULL AMOUNT OF ITS MORTGAGE FOR THE ABSENCE OF MORTGAGE REDEMPTION INSURANCE.

This assignment challenges the trial court's imposition of a duty on appellant to inform mortgagors of their responsibility to obtain credit life insurance. Appellant seeks to couch the lower court's decision under contract law with phrases taken out of context, when it appears that the duty and breach, found by the Court were derived from tort law. The trial court held that the Regulation Z Disclosure Statement does not create a binding contractual agreement. The trial court's decision herein held, in effect, that the signing of the Regulation Z Form with its current language creates a duty upon the S & L. The duty is to further disclose to the borrower that if creditor life insurance is desired the borrower must independently procure such insurance.

When there are two innocent parties the party which could have best avoided the harm must suffer the loss resulting therefrom. The Regulation Z language, with a most reasonable interpretation, misleads a borrower into believing that insurance or an application for insurance will be forthcoming from the S & L [6] if he signs the appropriate blank. Since the most reasonable, interpretation of the form readily results in such confusion, appellant was correctly found to have been negligent in failing to disclose

the fact that, despite what the form said, the borrower had to obtain the insurance on his own. The trial court's holding in this regard should not be overturned.

The Third Assignment is:

THE TRIAL COURT ERRED IN PLACING THE BURDEN OF PROOF ON THE BREACH OF DUTY TO INFORM ISSUE UPON APPELLANT COUNTY SAVINGS.

We find no valid support for this contention in the record. It appears that appellee proved that her husband was not informed of the need to independently procure insurance, and thus appellee proved this breach of duty. The trial court heard Mrs. Davis' testimony as to the meetings in October of 1972 with S & L officials. The judge found such testimony persuasive despite a S & L witness' testimony. The appellant has failed to demonstrate error on Assignment of Error Three and, therefore, said assignment is without merit.

Appellant's Assignments 4, 5, and 6 are as follows:

4. THE JUDGMENT OF THE COMMON PLEAS COURT IS NOT SUPPORTED BY THE EVIDENCE.

5. THE JUDGMENT OF THE COMMON PLEAS COURT IS AGAINST THE MAINIFEST WEIGHT OF THE EVIDENCE.

6. THE COURT OF COMMON PLEAS ERRED IN OVERRULING COUNTY SAVINGS' MOTION FOR JUDGMENT AT THE CLOSE OF APPELLEES CASE. (T.pp. 68, 104)

These last three assignments of error go to the trial
[7] court's judgment not having been consistent with the

evidence at trial. To do so, appellant must demonstrate that there was no reliable, probative evidence which, if believed, would support the trial court's judgment. There are several instances during Mrs. Davis' testimony on direct and cross which, if believed, would support the lower judgment. The Davises went to the S & L with the intention of getting the necessary insurance. When they left the S & L, after having carefully read the papers, including Regulation Z, they believed that procuring other insurance would be superfluous. Therefore, the trial court's finding of reliance, by the Davises, upon the S & L to take the necessary steps to get insurance, is supported by the evidence.

Appellant's argument against proximate cause is without foundation. The evidence adduced at trial furnishes a reasonable basis for sustaining appellee's proximate cause claim. Since the Davises desired insurance which would have protected them in the instant situation, and because they were misled by the wording and signing of Regulation Z, appellant's negligence, in not calling appellee's attention to the discrepancy between the form's language and what in actuality was required, contributed directly to the resulting pecuniary injury. On this point there appears to be sufficient evidence in the record to support the trial court's judgment.

For the reasoning indicated, we hold there was no prejudicial error and that the judgment of the trial court should be affirmed.

[8] Judgment affirmed.

/s/ EDWIN T. HOFSTETTER
Judge

DAHLING, *P.J.*, COOK, *J.*, concur.

JUDGMENT ENTRY OF THE COURT OF APPEALS OF ASHTABULA COUNTY, OHIO

(Filed February 20, 1980)

No. 988

IN THE COURT OF APPEALS
ELEVENTH DISTRICT
COUNTY OF ASHTABULA

GEORGE L. STONE, *et al.*,
Plaintiff,

vs.

JUDY V. DAVIS, *et al.*,
Appellees,

and

ASHTABULA COUNTY SAVINGS & LOAN COMPANY,
Appellant

JUDGMENT ENTRY

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's Opinion, which is incorporated herein by reference.

It is ordered that appellee recover of appellant the costs herein taxed.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ EDWIN T. HOFSTETTER
Judge

OPINION OF THE COURT OF COMMON PLEAS OF ASHTABULA COUNTY, OHIO

(Filed January 10, 1979)

No. 66584

IN THE COURT OF COMMON PLEAS

THE STATE OF OHIO)
) ss:
ASHTABULA COUNTY)

GEORGE L. STONE, *et al.*,
Plaintiffs,

vs.

JUDY V. DAVIS, *et al.*,
Defendants.

JUDGMENT

This cause came before this Court on October 11, 1978 and was heard without the intervention of a Jury on the merits of a Cross Complaint filed by co-defendant, Ashtabula County Savings and Loan and counter-claim to the cross complaint filed by co-defendant, Judy V. Davis.

The plaintiffs were not present or represented by counsel. Defendant and cross complainant, Judy Davis, was present with her counsel, Frank Bodor, and defendant and cross-complainant, Ashtabula County Savings and Loan, was represented by their counsel, Elbert Weidner and John Hallbauer.

In addition to the offering of evidence each side submitted briefs to the Court.

The plaintiffs, George and Clara Stone, sellers of a farm located in Austinburg Townhip, Ashtabula County, originally brought this action in foreclosure to recover $45,650 owing from a promissory note executed and delivered by co-defendant, Judy V. Davis on November 24, 1972. Also joined in this lawsuit as defendants were the Ashtabula County Savings and Loan, the lender and holder of a mortgage on the Davis property, the State of Ohio Office of Attorney General, and Howard Fortney, Ashtabula County Treasurer. By stipulations filed on October 11, 1978, all parties agree to the validity of the plaintiffs' lien upon the premises.

The facts before this Court are mostly undisputed. Danny Davis and his wife, Judy, who were 19 and 18 years of age respectively, applied to Ashtabula County Savings and Loan Company, now Cardinal Federal Savings and Loan Association, for a mortgage loan to buy a farm. They received a letter from the bank (Davis Exhibit 1), saying their loan was approved **[2]** in the amount of $60,000 and the monthly payments would be $463.10 excluding taxes and insurance. They were given by the bank and both signed a Regulation Z Form (Davis Exhibit 2), required by the Federal Reserve Board saying that the amount of their loan was $60,000 and that payments for principal and interest on this transaction shall be 300 monthly installments of $463.10.

The Regulation Z Form also contained the following language: "Credit life, accident, health or loss of income insurance is not required to obtain this loan. No charge is made for such insurance and no such insurance is provided unless the borrower signs the appropriate statement below. ..... is available at a cost of

$..... for the ..... year term of the initial policy." Beneath this were alternative spaces to be signed, indicating whether the borrower did or did not want mortgage insurance coverage, and Mr. Davis indicated he did want such insurance. The only factual dispute in the case centers about this document and what the parties did pursuant to it.

The question presented is whether the signing of the Regulation Z Disclosure Statement created either a duty to procure creditor life insurance or the duty to disclose that the borrower not the lender must independently procure creditor life insurance on his own volition.

The bank argues that the Regulation Z Form is written pursuant to the Truth-in-Lending Act, 15 USC 1601 et seq. Further, the bank asserts that the purpose of the Truth-in-Lending Act is to provide full disclosure to a borrower of all material aspects of the loan agreement but not to create contractual commitments. A cursory review by this Court of Section 1605 (B) of Title 15 clearly supports the position that the purpose of the Truth-in-Lending Act is to provide full disclosure of a loan agreement. The Federal Statute requires that charges for premiums for credit life, accident, or health insurance should be included in the finance charge of the loan transaction unless "(B)(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit."

Hence, Regulation Z strives to meet the statutory requirement that insurance is not required for the loan. In this regard, the language appears successful. The disclosure goes on to state that no [3] insurance will be provided unless the borrower signs below. This language

is an attempt to comply with (B)(2) of the Federal Statute which states:

> "In order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof." Again the language of the Regulation Z Form appears to meet the requirements of 1605(B)(2).

Therefore, the two essential purposes of the Truth-in-Lending Act appear to be met by the language of the Regulation Z Form. Nevertheless, the bank's duty does not end with the presentation to a borrower of the Regulation Z Form. The signing of the disclosure form is the expressed affirmative indication of the borrower to obtain insurance in connection with the loan. The language of 1605(B) speaks of obtaining insurance *in connection with* any consumer credit transaction. Hence, when Danny Davis signed the Regulation Z Form he expressed his affirmative written indication that he wished to obtain creditors life insurance *in connection with* the loan he was about to obtain. This is not to say that the bank must act as insurance agent for its borrower and in fact, counsel for the bank quickly points out that certain portions of the Ohio Revised Code would preclude such an activity by a lending institution. However, the bank does have a duty to go beyond the mere presentation of the disclosure statement. It should instruct the borrower that he must procure the insurance on his own behalf. This instruction could be given orally although prudent banking practice suggests that it should be given in writing and acknowledged with the borrower's signature. All the counter claimant, Danny Davis, knew is what he read on the Regulation Z Form. The language that no insurance is

provided unless the borrower signs the appropriate statement below creates a logical corollary that if signed insurance will be provided. No other language in the Regulation Z Disclosure Statement overcomes this inference which is so apparent that its misleading nature is inescapable. In an attempt to fully disclose the terms of the mortgage loan, the bank failed to disclose that the borrower and not the bank must independently procure his own insurance. Unquestionably the counter claimant relied upon this misleading language and relied to his detriment. The reasonableness of this reliance is even more apparent in that the insurance is sought *in connection with* the obtaining of the loan. Hence, it is reasonable that **[4]** the borrower would believe that his signing of the loan agreement and the disclosure form fulfilled his needs to procure creditor life insurance just as it did to procure a loan.

The evidence at trial disclosed that according to the bank vice-president no established procedure existed within the bank on informing or assisting borrowers in obtaining loans. Mrs. Hillyer, the bank representative, whose name appears at the bottom of the disclosure statement, testified that she had no specific recollection of the meeting between herself and the Davises, but that she had mortgage life insurance forms which she supplied upon request. However, this Court must ponder how the borrower could possibly know that he should request such an application when the form he just completed says "no insurance will be provided unless signed below" and he signs below. Mrs. Hillyer further testified that although her name appeared on the bottom of the disclosure statement she in fact did not sign the statement. Rather, her authorized employee, Mrs. Reuschling signed Mrs. Hillyer's name. Mrs. Reuschling did not testify.

The bank argues that nowhere on the payment receipt form is there a deduction for insurance premiums. The borrower might have believed that the procurement of insurance was pending or that billing would soon take place. Regardless, the borrower did know that he signed a statement and that the reasonable corollary of such a statement was that if he signed below he would have insurance. Additionally, if the failure to pay premiums by the borrower should place the borrower on notice, it should also place the bank on notice. In reviewing its loan portfolio, the bank should have been aware that Mr. Davis wanted insurance and that none had been obtained. Such a discrepancy should strike the curiosity of the bank as well as the borrower. However, the evidence shows that no inquiry was made of the Davises by the bank.

The Davis' made continual monthly loan payments from 1972 until April of 1976. No payments were made for the months of May, June, and July. (Mr. Davis died on July 18, 1975.) The bank argues that if any insurance would have been procured, it would have expired 31 days after the last loan payment. It is well settled in the law of insurance that before any policy is cancelled there must be a grace period. Ohio has [5] mandated such a requirement into the Revised Code at Section 3915.05. The reason the law has developed such a requirement is to protect policy holders from suddenly losing coverage and allow them an opportunity to revive their policy. In this case, the Davis' had no grace period because they had no policy. Although they had reason to believe they were covered, they had no policy contract from which to reflect. Without the policy there was no notice of the expiration period. Hence, without notice of the termination of the non-existent policy, the Davis' could not have known of the opportunity to revive their policy—the very purpose of the grace period requirement. Therefore, the 31 day grace period hypo-

thetically asserted by the bank is without merit hypothetically and actually.

The defendant cites *Burgess v. Charlottesville Savings and Loan Assn.*, 349 F.Supp. 133 (W.D. Va. 1972) and *Peer v. First Federal Savings and Loan Assn. of Cumberland*, 273 MD. 610, 331 A.2d 299 (1975). In both cases, the Virginia and Maryland Courts held that the signing of the Regulation Z Disclosure Statement does not in and of itself create a binding contractual agreement. This Court does not quarrel with these findings nor is such its finding. Rather, the holding of this Court is that the signing of the Regulation Z Form with its current language creates a duty upon the bank. The duty is to further disclose to the borrower that if creditor life insurance is desired the borrower must independently procure such insurance. The status of these parties is obvious. The bank is in the business of lending money. The bank is more familiar than the borrower with the manner of lending money, the legal requirements of such loans, and the means of securing such loans. For many borrowers, the purchase of a home is a once-in-a-life-time transaction. Hence, the borrower is usually unexposed to such dealings and often looks to the bank officers for assistance and guidance for the proper manner and methods to obtain loans. Most banks acknowledge their role as money counselor and lender and certainly the United States Congress recognized this imbalance between the status of the lender and the borrower when it passed the Truth-in-Lending Law. Although in this case, the Ashtabula County Savings and Loan Co complied with the Federal disclosure requirements, they were clearly negligent in further disclosing the simple fact that the borrower need obtain his own insurance.

[6] The case of *Park Federal Savings and Loan Assn. v. Lillie, et al.*, 24 O.Misc. 271, 53 O.O.2d, 368 (Franklin County C.P. 1970) though not directly on point to these facts is more akin to the law which governs this situation. In

Park, the Court held at Syllabus 1: "Where a husband and wife sign a note upon condition that a loan company would procure life insurance on the life of a husband, but the loan company negligently fails to procure such insurance, it is liable for damages to the extent of the agreed insurance."

One of the conditions agreed to in this case was that the disclosure statement fully disclosed the terms of the loan. What was not disclosed was who had the duty to procure life insurance. The language of the form was sufficiently ambiguous as to leave the borrower with the clear impression that the bank would obtain the insurance. The failure of the bank to clarify that point was the breach of the duty. It is axiomatic in the common law that the language of a form is most strictly construed against the preparer of the form. Since the bank prepared the form, the ambiguity created must be resolved against the bank. When so resolved, it is clear to this Court that the bank created a duty to go forward and either procure insurance or notify the borrower that the borrower must procure insurance. There is no evidence that Mrs. Reuschling, who signed Mrs. Hillyer's name for the bank, ever met such a duty, the breach of which has proximately caused the damage to the Davis'.

It is the finding of this Court that the bank's failure to disclose to the Davis' that the borrower must independently procure his own insurance created a breach of duty which through the bank's negligence resulted in the Davis' loss of insurance coverage.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Ashtabula County Savings and Loan Company, now Cardinal Federal Savings and Loan Association, is liable to the full extent of the insurance coverage loss to the Davis'.

/s/ JOSEPH E. MAHONEY
Judge

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF ASHTABULA COUNTY, OHIO

(Entered March 12, 1979)

No. 66584

COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

GEORGE L. STONE, *et al.*,
Plaintiffs,

vs.

JUDY V. DAVIS, *et al.*,
Defendants.

JUDGMENT ENTRY

This matter was heard March 2, 1979, on the motion of defendant Ashtabula County Savings & Loan Company for separate findings of fact and conclusions of law.

Upon consideration thereof, the court finds and concludes that its judgment entered herein on January 10, 1979, prior to the filing of said motion, meets the requirements of Rule of Civil Procedure 52 but should have been designated an opinion as well as a judgment.

IT IS THEREFORE ORDERED that the title of said entry be amended nunc pro tunc to read "Opinion and Judgment" and that said motion be and is hereby overruled.

/s/ JOSEPH E. MAHONEY
Judge

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS OF ASHTABULA COUNTY, OHIO

(Entered March 12, 1979)

This matter was heard March 2, 1979, on the motion of defendant Ashtabula County Savings & Loan Company for final judgment, stay of execution, and the fixing of a supersedeas bond.

Upon consideration whereof, the court finds that there is no just reason for delay and that the judgment in favor of defendant Judy V. Davis, individually and as administratrix of the estate of Danny I. Davis, on her crossclaim against defendant Ashtabula County Savings & Loan Company, entered herein on January 10, 1979, should be deemed final with respect to the issues determined thereby. The court further finds that the proceedings herein for foreclosure of mortgages should be stayed pending the outcome of the appeal of Ashtabula County Savings & Loan Company from said judgment. The court further finds that the amount of the supersedeas bond to be filed by defendant Ashtabula County Savings & Loan Company should be $1,000.00.

IT IS THEREFORE ORDERED that the judgment of this court entered on January 10, 1979, in favor of defendant Judy V. Davis, individually and as administratrix of the estate of Danny I. Davis, on her crossclaim against defendant Ashtabula County Savings & Loan Company shall be final as to the issues thereby determined.

IT IS FURTHER ORDERED that the foreclosure proceedings herein shall be stayed pending outcome of the appeal of defendant Ashtabula County Savings & Loan Company from said final judgment upon the filing by said defendant with the clerk of this court of a supersedeas bond, with satisfactory surety, in the amount of $1,000.00.

/s/ JOSEPH E. MAHONEY
Judge

Best Copy Available

A38

NOTICE TO CUSTOMERS
REQUIRED BY FEDERAL LAW
FEDERAL RESERVE REGULATION Z

Danny I. Davis
Judy V. Davis
Route # 1
Dorset, Ohio 44032

REAL PROPERTY TRANSACTION PURCHASE LOAN
SECURED BY FIRST LIEN ON A DWELLING

LOAN NO. _____

The FINANCE CHARGE on this transaction begins to accrue on date of loan closing.

The AMOUNT OF THE LOAN in this transaction is ..... $ 60,000.00

Less the PREPAID FINANCE CHARGE for this transaction which includes:

1. Service fee	$ 25.00	5.		$	
2. 1% add'l. fee	$ 600.00	6.		$	
3. 1% Interest Reserve	$ 600.00	7.		$	
4.	$	8.		$	
			TOTAL	$	1,225.00

Equals the AMOUNT FINANCED in this transaction ..... $ 58,775.00

This amount includes:

1.	$	5.		$	
2.	$	6.		$	
3.	$	7.		$	
4.	$	8.		$	
		NET PROCEEDS		$	

The ANNUAL PERCENTAGE RATE on this transaction is 8.25 %

Itemized CHARGES EXCLUDABLE from the FINANCE CHARGE in this transaction:

1. Normal Rec. fee	$ 10.25	5.		$	
2.	$	6.		$	
3.	$	7.		$	
4.	$	8.		$	

Payments for principal and interest on this transaction shall be 300 monthly installments of $ 463.10 beginning on the _____ day of _____ 19__ and due on the _____ day of each month thereafter. #30 to 45 days after closin

This institution's security interest in this transaction is a 1st mtg. on property located at Route # 307, Austinburg Twp. and specifically described in the documents furnished for this loan. The documents executed in connection with this transaction cover all after acquired property and also stand as security for future advances, the terms for which are described in the documents.

Describe late payment formula, if any, in accordance with Section 226.10(d)(3): Default in the payment of any monthly installment as herein provided in any six month period ending June 30 or December 31st shall increase the per centum rate for such period one per cent.

Describe prepayment formula, if any, in accordance with Section 226.8(b)(6):

None

Describe rebate formula, if any, in accordance with Section 226.8(b)(7):

None

Miscellaneous disclosures, or explanations, if any.

None

INSURANCE

PROPERTY INSURANCE

Property insurance, if written in connection with this loan, may be obtained by borrower through any person of his choice, provided however, the creditor reserves the right of refusal, for reasonable cause, to accept an insurer offered by the borrower. If borrower desires property insurance to be obtained from or through the creditor, the rate will be $ _____ for the _____ year term of the initial policy.

OTHER INSURANCE

Credit life, accident, health or loss of income insurance is not required to obtain this loan. No charge is made for such insurance and no such insurance is provided unless the borrower signs the appropriate statement below. _____ (Type of insurance) is available at a rate of $ _____ for the _____ year term of the initial policy.

I desire Mortgage insurance coverage. I DO NOT desire such insurance coverage.

10/27/72 _____ Date _____ Signature

ASHTABULA COUNTY SAVINGS & LOAN COMPANY

Betty N. Shilyea
Assistant Vice President
TITLE
October 26, 1972
DATE

I hereby acknowledge receipt of the disclosures made in this notice.

Danny I. Davis
Judy V. Davis
Customers
10/27/72
DATE

[¶ 3855] Statement for Instalment Loan

Exhibit E

DISCLOSURE STATEMENT OF LOAN

BORROWERS (NAMES AND ADDRESSES): LENDER: LOAN NO. _____ Date _____

_____ (STREET ADDRESS)

_____ (CITY) (STATE) (ZIP)

TOTAL OF PAYMENTS	FINANCE CHARGE	AMOUNT FINANCED	ANNUAL PERCENTAGE RATE:	CREDIT LIFE INSURANCE CHARGE	DISABILITY INSURANCE CHARGE	PROPERTY INSURANCE CHARGE
$	$	$	%	$	$	$

PAYABLE IN: CONSECUTIVE MONTHLY INSTALLMENTS	DUE DATE OF PAYMENTS			AMOUNT OF PAYMENTS			
	FIRST:	OTHERS: SAME DAY OF EACH MONTH	FINAL:	FIRST:	OTHERS:	FINAL:	RECORDING FEE
				$	$	$	$

INSURANCE

PROPERTY INSURANCE, if written in connection with this loan, may be obtained by borrower through any person of his choice. If borrower desires property insurance to be obtained through the creditor, the cost will be $_____ for the term of the credit.

CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan. No charge is made for credit insurance and no credit insurance is provided unless the borrower signs the appropriate statement below:

(a) The cost for Credit Life Insurance alone will be $_____ for the term of the credit.

(b) The cost for Credit Life and Disability Insurance will be $_____ for the term of the credit.

I desire Credit Life and Disability Insurance.	I desire Credit Life insurance only.	I DO NOT want Credit Life or Disability Insurance.
_____ (Date) _____ (Signature)	_____ (Date) _____ (Signature)	_____ (Date) _____ (Signature)

REBATE FOR PREPAYMENT IN FULL. If the loan contract is prepaid in full by cash, a new loan, refinancing or otherwise before the final installment date, the borrower shall receive a rebate of precomputed interest computed under the Rule of 78's.

DEFAULT CHARGE. [The creditor should set forth the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments.]

SECURITY

DESCRIPTION

A. ☐ This Loan is Secured By a Security Agreement of Even Date covering _____

The Security Agreement will secure future or other indebtedness and will cover after acquired property.

☐ Motor Vehicle(s): Make _____ Serial No: _____

☐ Household Goods & Appliances of the following description: _____

_____

_____

☐ Other: (Describe) _____

B. ☐ This Loan is Unsecured.

I ACKNOWLEDGE RECEIPT OF A COPY OF THIS STATEMENT.

Borrower: _____

Witness: _____

This form, when properly completed, will show how a creditor may comply with the disclosure requirements of the provisions of paragraph (b) [¶ 3566] and (d) [¶ 3568] of § 226.8 of Regulation Z for the type of credit extended in this example. This form is intended solely for purposes of demonstration and it is not the only format which will permit a creditor to comply with disclosure requirements of Regulation Z.

© 1981, Commerce Clearing House, Inc.

ILLUSTRATION OF FEDERAL DISCLOSURES ON A SEPARATE STATEMENT FOR A LOAN REPAYABLE IN INSTALLMENTS

(Section 226.8 [¶ 3565])

Applicable Disclosures Shown in Exhibit E	Regulation Z Reference (226.8)
1. Identification of Transaction	(a) [¶ 3565]
2. "Amount Financed" including itemized charges other than finance charges. (Note § 226.4(b))	(d) (1) [¶ 3568]
3. "Finance Charge"	(d) (3)
4. "Annual Percentage Rate"	(b) (2) [¶ 3566]
5. Number, Amount, and Due Date of Payments	(b) (3)
6. "Total of Payments"	(b) (3)
7. Default, Delinquency, or Similar Charge	(b) (4)
8. Identification of Security Interest	(b) (5)
9. Identification of Property to Which Security Interest Relates	(b) (5)
10. Method of Computing Any Unearned Portion of the Finance Charge	(b) (7)
11. After-acquired Property Subject to Security Interest	(b) (5)
12. Security for Future Indebtedness	(b) (5)
13. Identification of Creditor	(a) [¶ 3565]
14. Credit Life, Accident, and Health Insurance	§ 226.4(a) (5) [¶ 3518]
15. Property and Liability Insurance	§ 226.4 (a) (6)

Other Disclosures Not Applicable to Example Shown in Exhibit E

Regulation Z prescribes other disclosures to be made in connection with loan credit which are not applicable to the illustrated example, such as, prepaid finance charge (d)(2) [¶ 3568], required deposit balance (d)(2) [¶ 3568], and balloon payment (b)(3) [¶ 3566], etc.

Office - Supreme Court, U.S.
FILED
NOV 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-125

In the Supreme Court of the United States

October Term, 1981

CARDINAL FEDERAL SAVINGS & LOAN ASSOCIATION,
Petitioner,

vs.

JUDY V. DAVIS, Individually and As Administratrix of the Estate of DANNY I. DAVIS, DECEASED,
Respondent

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of the State of Ohio

BRIEF OF RESPONDENT

Frank R. Bodor
157 Porter Street, N.E.
Warren, Ohio 44483
Telephone: (216) 399-2233

Attorney and Counsel of Record for Respondent

TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT OF THE CASE CORRECTING INACCURACIES AND OMISSIONS OF FACT IN PETITIONER'S STATEMENT 1

SUMMARY OF ARGUMENT 6

ARGUMENT AND REASONS FOR DENYING THE WRIT 8

CONCLUSION 14

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Cases:

Burgess vs. Charlottesville Savings and Loan Association, 477 F 2d 40 (1973) 6, 8, 9, 10-11

Cabana Management Inc. vs. Hyatt Corporation, 441 F. 2d 862 (1971) . . . 12

Shulthis vs. McDougal, 225 U. S. 561, 32 S. Ct. 704, 56 L. Ed. 1205 (1912) 12-13

Washington vs. Rothenberg, 436 F. Supp. 699 (1977) 12

Westland Oil Development Corp. vs. Summit Transportation Company, 481 F. Supp. 15 (1979) 11

SUPPLEMENTAL STATEMENT OF THE CASE CORRECTING INACCURACIES AND OMISSIONS OF FACT IN PETITIONER'S STATEMENT

The facts disclosed in Petitioner's Statement of the Case, although couched in terms and emphasis most favorable to Petitioner, is sufficient for this Court's consideration of the limited issue of the denying or granting of a writ of certiorari, except for the following corrections of inaccuracies and omissions of fact:

Inaccuracies

Inaccuracy No. 1:

Petitioner states at pages 6 and 7 of its brief that the Federal Reserve Regulation Z form "is the sole basis for the holdings of the Ohio Courts that Petitioner Ashtabula S & L is liable to Respondent Davis for the full unpaid balance of the note secured by the mortgage".

Inaccuracy No. 2:

Petitioner states at page 11 of its brief that "The entire case is thus predicated upon the language of the precontractual Regulation Z form, and nothing more."

Inaccuracy No. 3:

Petitioner states at pages 12 and 13 of its brief that the two official syllabi of the Ohio Supreme Court's opinion (App. A1) "show that such court based its affirmance of the lower state courts' judgments squarely upon the language of the Regulation Z disclosure form and not upon any other fact or document in the case".

Correction of Inaccuracies Nos. 1, 2, and 3

Aside from the fact that the above statements are argumentative they are inaccurate. It has been solely the contention of the Petitioner, instead of the Ohio Courts, to suggest that the determination of the case hinged on the Federal Regulation Z form and the Federal Truth in Lending Act.

All three levels of Ohio courts, consisting of a composite of 11 judges, unanimously agreed without any dissent that the case was predicated upon the principles of the Ohio common law of contract and negligence. (See Petitioner's Appendix at both pages A8 and A9 wherein the Ohio Supreme Court specifically ruled on the basis of a breach of an implied fiduciary duty by the Petitioner Savings and Loan Company under Ohio tort and contract common law which determination was found to be entirely consistent with the existence of the federal truth-in-lending law.)

Omissions

Petitioner failed to relate that the record discloses that prior and in addition to the execution of the Regulation Z form that, among other things, the decedent Respondent and Petitioner Savings and Loan's officer discussed the subject of mortgage insurance coverage. The Savings and Loan

officer told them that if they desired mortgage life insurance that they should sign at the proper place upon the Regulation Z form which was given to them.

The record further disclosed that the Savings and Loan, hereinafter designated "S & L", specifically typed in the word "mortgage" in the blank provided to complete the sentence "I desire mortgage insurance coverage" and that the disclosure statement varied and reflected a higher amount than the original amount shown in an earlier "loan request sheet" prepared by the "S & L" and which was referred to by the officer as a document that everyone in the "S & L" hated and which was eventually changed.

Another "S & L" officer of the Petitioner testified that in the majority of instances the mortgage life insurance had not been approved until after the closing; that it was customary for the "S & L" to furnish forms of mortgage life insurance for

the customer even to the extent of filling in a portion of the applications; that the "S & L" dealt with one mortgage insurance company called the "National Old Line Company"; that payments would be made through the "S & L" by the customer with their regular mortgage payment; that the "S & L" would in turn pay all life insurance premiums every 6 months with a lump sum payment for all insured customers and that premium notices would be mailed by the insurance company to the "S & L" instead of the customer.

The record also revealed that Petitioner "S & L" was paid percentage fees by the life insurance company for collecting and remitting policy premiums; that the "S & L" had a person particularly designated in its office to handle the accounting for the collection of premiums; that the "S & L" made no attempt to communicate with Respondents regarding the clause signed by the decedent Respondent signifying his request

for mortgage insurance and that the document was put in a security file and nothing more was done with it.

The evidence, by admission of the "S & L" officer, showed that she didn't know whether there was the usual follow-up by a bank official to see whether or not the Respondent received an application for mortgage life insurance as was the usual policy of the "S & L".

SUMMARY OF ARGUMENT

The identical facts and issues raised by Petitioner were decided in the Fourth Circuit Court of Appeals case of Burgess vs. Charlottesville Savings and Loan Assoc., 477 F 2d 40 (1973) in line with previous cases and followed by subsequent analogous case law. The case at bar presents no federal question.

The Federal Regulation Z form which involves the Federal Truth-in-Lending Act regarding disclosure is not an issue of the case. Respondent acknowledges that the disclosure as required by the form and act was properly made prior to her final loan arrangements with the Petitioner. The real basis on which Respondent filed her action and upon which the case was decided in the Ohio courts was alleged contract or agreement to procure insurance, the breach of which gave rise to an action both in contract and tort under the common law of Ohio. Although the alleged agreement had in part its origin in the Federal Regulation Z form this was incidental and the basic issue decided in the case was whether the language used by the Petitioner in its form of loan application was sufficient to be the basis for the creation of a contractual right or violation of a fiduciary duty determinable solely under Ohio law and not federal law.

ARGUMENT AND REASONS FOR DENYING THE WRIT

The very same issues submitted by Petitioner with identical facts as the case at bar was decided by the Fourth Circuit United States Court of Appeals in the leading case of Burgess vs. Charlottesville Savings and Loan Association, 477 Fed. Reporter 2d 40 (April 9, 1973). In that case the U. S. Court of Appeals ruled that where the real basis of plaintiffs cause of action was alleged breach of agreement to procure credit life insurance, thereby giving her, under her theory, cause of action both in contract and in tort under state law, even though the alleged agreement had its origin in the Regulation Z notice form intended by the Savings and Loan Company as a compliance with the Truth-in-Lending Act and regulations promulgated by the Federal Reserve the action presented no federal question upon

which the result would depend and was determinable solely by state law.

The U. S. Court of Appeals in the Burgess case under identical facts and involving the exact language contained in the Federal Regulation Z form ruled that the purpose of the Truth-in-Lending Act is to permit the borrower, with full knowledge of costs, to make comparisons preceding the final closing of the loan. The Court noted that it is the obligation to disclose, not the duty of subsequent performance, towards which the Act is directed. The Court maintained that the Act provided its own remedy for the failure to make disclosure as required with which the savings and loan company fully complied. Thus, the Plaintiff did not have any right to the statutory remedy authorized for a violation of the Truth-in-Lending Act but the construction of the language in the Federal Regulation Z form was an issue under Virginia law as to

whether a valid contract to procure credit life insurance was effected between the parties.

The Burgess case is clear and concise but in order to give emphasis to its ruling the Court reiterated its reasoning in summary form on page 45 of its decision which reads in pertinent part as follows:

> "To repeat: Her action is for failure to perform on what she claims was an offer by the defendant to procure and an acceptance of that offer by her and her deceased husband. Such action involves a construction of the language in the form used by the defendant to give disclosure required under the Truth-in-Lending Act, it is true, but not for the purpose of determining whether that language represents sufficient compliance with the Act (and thus a construction of federal law) but for the purpose of determining whether such language will under the law of

Virginia constitute a valid contract to procure. Such an action presents no federal question upon which the result of the action will depend. The District Court should remand the cause to the State Court.

Remanded with instructions to the District Court to remand the cause to the State Court from which it was removed." (Emphasis added.)

Likewise, in the case of Westland Oil Development Corp. vs. Summit Transportation Company, 481 F. Supp. 15 (1979) which was affirmed in 614 F. 2d 768, the United States District Court of Texas ruled that "breach of contract claims are not converted to federal causes of action just because contractual language at issue has been included in order to comply with federal regulations." The Texas Court affirmed by the U. S. Court of Appeals cited the Burgess case and numerous other cases in support of its

ruling to deny federal court jurisdiction. (See also Washington vs. Rothenberg, 436 F. Supp. 699 [1977].)

In the case of Cabana Management Inc. vs. Hyatt Corporation, 441 F. 2d 862 (1971) the Fifth Circuit United States Court of Appeals stated at page 864:

> "... when the controversy between the parties may be decided under local law without the necessity of interpreting a federal statute, there is no federal jurisdiction."

This Supreme Court observed in the early case of Shulthis vs. McDougal, 225 U. S. 561, 32 S. Ct. 704, 56 L. Ed. 1205 (1912) that a question of federal law often lurks in the background of a case, but this alone does not confer jurisdiction upon the federal courts. The reasoning is stated as follows at page 579 of said U. S. Reports:

> "A suit to enforce a right which takes its origin in the laws of the United

States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends."

The case at bar is identical as to the facts and issues raised in the leading Burgess case cited supra followed by numerous Appellate Courts and with the prevailing views cited in the other Appellate Court cases this case clearly does not involve a federal issue and does not qualify for consideration of a writ of certiorari under Rule 17 of the rules of this Supreme Court.

CONCLUSION

Pursuant to the Burgess case law cited directly in point with the case at bar and Rule 17 of the Rules of this United States Supreme Court Respondent respectfully requests that Petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

Frank R. Bodor
Respondent's Attorney
and Counsel of Record

CERTIFICATE OF SERVICE

All parties required to be served have been served with a copy of Respondent's Brief by depositing this 30th day of October, 1981, three (3) copies of Respondent's Brief in the United States Mail, with first-class postage prepaid, addressed to Petitioner's Counsel of Record, Attorney John A. Hallbauer, Parks, Eisele, Bates & Wilsman, 1100 The Illuminating Building, Cleveland, Ohio, 44113.

Frank R. Bodor
Respondent's Attorney
and Counsel of Record